



AFRICAN
ENVIRONMENTAL
DEFENDERS



ADOPTING A NATIONAL LAW TO PROTECT ENVIRONMENTAL HUMAN RIGHTS DEFENDERS (EHRDs) IN KENYA

Strengthening Kenya's Legal Framework for Protection of Environmental Human Rights Defenders

Published: May 2023

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EXECUTIVE SUMMARY

This policy recommendation seeks to make a case for the importance of strengthening Kenya's legal framework for the protection of EHRDs as a means of proactive prevention of threats and advancing their work.

Across the globe, there have been increasing cases of assaults, intimidation, harassment, stigmatization, criminalization, and murder for EHRDs in an environment of impunity.[1] Despite the increasing pressures on civic spaces, EHRDs continue showing courage and leadership through their contribution to the struggle for environmental and climate justice. For these reasons states have an obligation to put in place protection and accountability mechanisms to address the challenges of EHRDs and provide remedies for human rights violations.

Currently, the recognition and protection of defenders can only be inferred through interpretation of other law such as: the *Constitution of Kenya; Public Order Act (Cap 56); Prevention of Torture Act, No. 12 of 2017; Access to information Act, No. 31 of 2016; Legal Aid Act, No. 6 of 2016 and the Witness Protection Act No. 16 of 2006*. However, the express recognition of EHRDs in legislation including the roles and responsibility of state and non-state actors to respect their rights would reduce, minimize, or help prevent the number of attacks against EHRDs and create an environment for them to engage in activism.



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Overview of the Situation of Environmental Human Rights Defenders

According to the Resource Governance Index, more than 80% of 58 resource-rich countries do not have satisfactory governance systems in their extractive industry sectors,¹ forcing Environmental Human Rights Defenders (EHRDs) to step in to fill the governance gap and promote environmental rule of law,² making them susceptible to threats and attacks.³

Across the globe, there have been increasing cases of assaults, intimidation, harassment, stigmatization, criminalization, and murder of EHRDs.⁴ Between 2002 and 2013, approximately 1,738 people were killed in 50 countries while defending their environment and land, and the pace of killing is increasing.⁵ Since 2001, reports indicate a trend of at least three people being killed on a weekly basis⁶ because of their activism. Many more are harassed, intimidated, criminalized, and forced from their lands. In 2017 alone, 197 environmental defenders were murdered.⁷

In 2018, Global Witness' Report identified 167 killings of EHRDs⁸ and although the figure is slightly lower than that for 2017, the number of reported deaths has been increasing on a weekly basis. Global Witness shows that at least 212 environment and land defenders

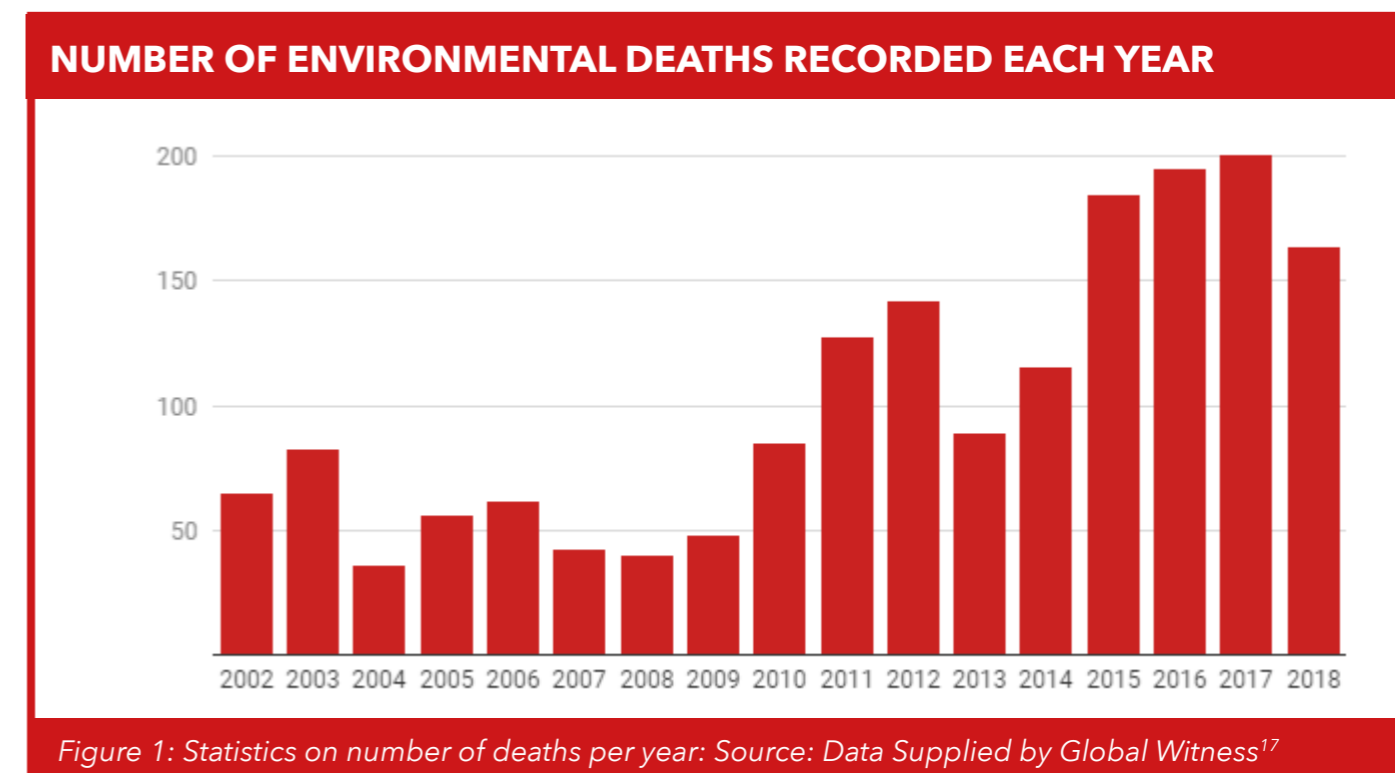
were killed across the world in 2019, making it the deadliest year ever.⁹ In 2022, Global Witness further reported that at least one defender has been killed every two days since 2012.

There is a lower number of reported EHRDs killings in Africa, despite the fact that activists defending land and environment in the region face gross violations and risks.¹⁰ The lower numbers point to a shortage of evidence, apart from the fact that less attention is paid to this issue than to others.¹¹ The 2018 Global Witness Report indicates that eight of the deaths came from Democratic Republic of Congo (DRC), two from the Gambia, another two from Kenya, and others from Senegal and South Africa.¹²



In 2019, ILC Africa members documented human rights abuses of 100 land and environmental defenders from across the African continent, while other records show 15 persons were killed in the same year.¹³ The cases of criminalization of land and environmental defenders are equally very common in the East African region and takes different forms.¹⁴

Indigenous people represent a disproportionate percentage of the defenders who are killed; about 40% of deaths recorded in 2015 and 2016, and about 30% (327 cases) in 2017, were indigenous people.¹⁵ In 2020, the environmental and indigenous people's rights was ranked the riskiest sector in Africa, contributing to at least 25% of the violations experienced.¹⁶



¹ Reuters (2013) <https://www.reuters.com/article/resources-management-idINDEE94E03820130515>
² UN Environment (2019), "Environmental Rule of Law". Available at <https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report>
³ ibid
⁴ The Conversation (2019), "More than 1,700 activists have been killed this century defending the environment." Available at <https://theconversation.com/more-than-1-700-activists-have-been-killed-this-century-defending-the-environment-120352>
⁵ UN Environment (2019), "Environmental rule of Law"
⁶ Global Witness (2020), "Enemies of the State". Available at <https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state/>
⁷ UN Environment (2019), "Environmental rule of Law"
⁸ Global Witness (2020), "Enemies of the State".
⁹ Mongabay (2020), 2019 was the deadliest year ever for environmental activists, watchdog group says". Available at: <https://news.mongabay.com/2020/07/2019-was-the-deadliest-year-ever-for-environmental-activists-watchdog-group-says/>
¹⁰ Global Witness (2021), "Global Witness reports 227 land and environmental activists murdered in a single year, the worst figure on record". Available at: <https://www.globalwitness.org/en/press-releases/global-witness-reports-227-land-and-environmental-activists-murdered-single-year-worst-figure-record/>
¹¹ ibid
¹² Africa Times (2019), "Report: 3 environmental defenders were killed each week in 2018". Available at <https://africetimes.com/2019/07/30/report-3-environmental-defenders-were-killed-each-week-in-2018/>

¹³ Frontline Defenders (2019) "Global Analysis 2019". Available at: <https://static.rasset.ie/documents/news/2020/01/global-analysis-2019-web.pdf>
¹⁴ ILC, Rights and Resources Initiative and OSI (2019), "Paying the Price: A Study on Criminalization of Land and Environmental Rights Defenders in East Africa". Available at https://rightsandresources.org/wp-content/uploads/2021/02/ILC_RRI_PayingthePrice_2.23.pdf
¹⁵ The Conversation (2019), "More than 1,700 activists have been killed this century defending the environment."
¹⁶ Frontline Defenders (2020) Global Analysis 2020". Available at: https://www.frontlinedefenders.org/sites/default/files/flid_global_analysis_2020.pdf
¹⁷ More than 1,700 activists have been killed this century defending the environment More than 1,700 activists have been killed this century defending the environment (theconversation.com)

THE GLOBAL SITUATION

In 2018, Global Witness documented 164 killings of land and environmental defenders – ordinary people murdered for defending their homes, forests and rivers against destructive industries. Countless more were silenced through violent attacks, arrests, death threats or lawsuits.

Our data on killings will never provide an accurate picture of the true scale of this problem, however. In some countries, the situation facing defenders is hard to gauge because the press isn't free, and

governments or NGOs don't systematically monitor or document abuses. Land grabbing can also be very hard to monitor in parts of the world that are mired in conflict.

These factors, coupled with the fact that we maintain a strict approach to verifying reports of killings, mean that our figures are only approximate. You can find more information on our methodology on page 38.

TOTAL NUMBER OF KILLINGS PER COUNTRY



NUMBER OF KILLINGS BY SECTOR

Mining & Extractives	43
Agribusiness	21
Water & Dams	17
Logging	13
Poaching	9
Fishing	2
Wind power	1
Other	7
No clear link to a sector	55

Figure 2: Statistics per Country, and per Sector: Source: Global Witness, Enemies of the State¹⁸

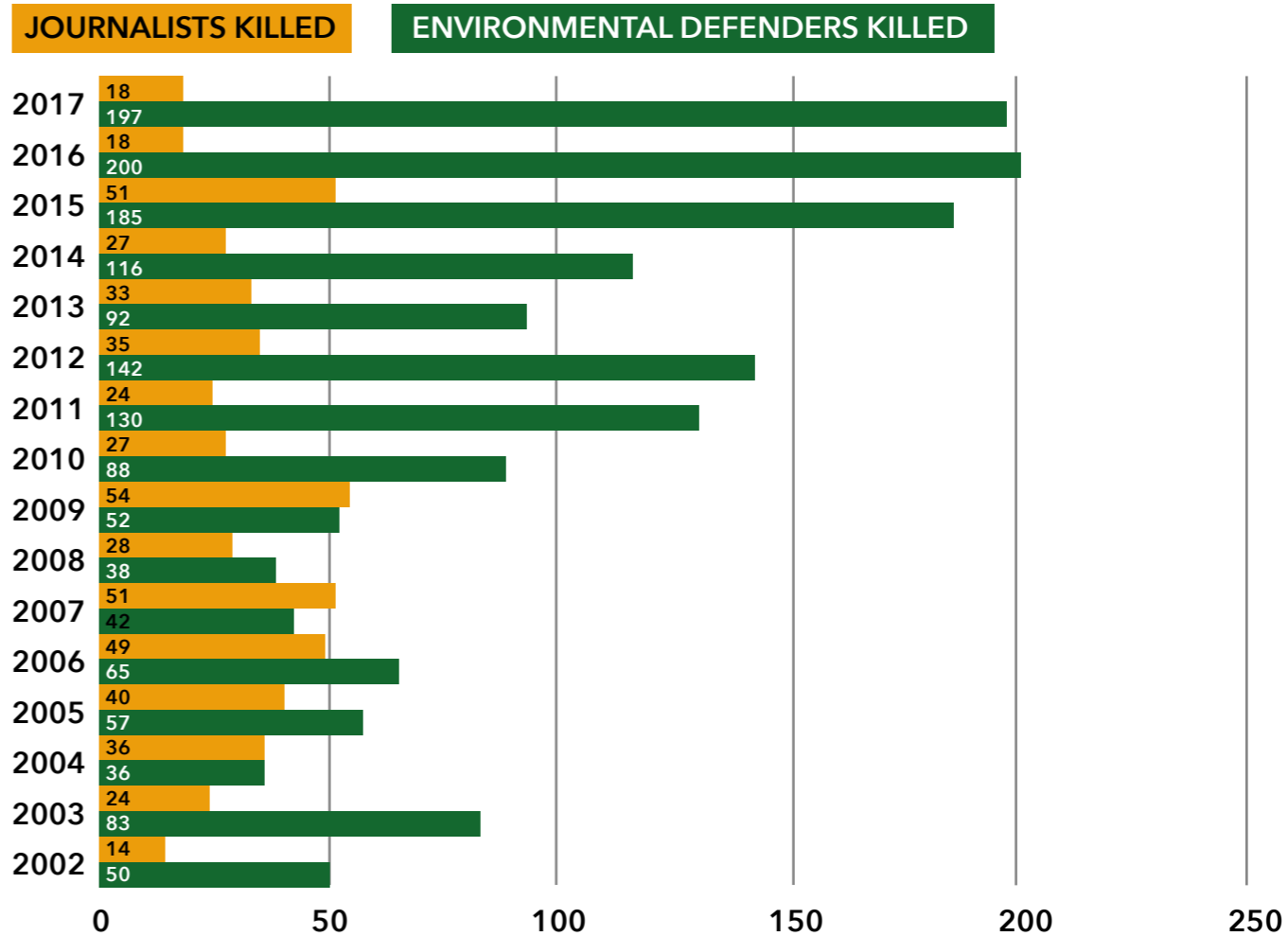


Figure 3: Environmental Defenders and Journalists Killed (2002-2017): Sources: CPJ 2018, Global Witness 2014, 2016, 2017 and The Guardian and Global Witness 2017.

According to the UN Special Rapporteur on Human Rights and Environment,¹⁹ EHRDs face numerous forms of persecution including murder. For every EHRD killed, there are 20 to 100 others that are harassed, unlawfully and lawfully arrested, and sued for defamation, amongst other forms of intimidation.²⁰ Non-lethal forms of violence against EHRDs take place every day in countries all over the world. These forms of violence include intimidation, assault, unlawful detention, limitations to the freedoms of speech, assembly, and association, shrinking of the democratic space, displacements, and limitations of access to natural resources and ecosystems, and media branding defenders as 'terrorists'.²¹ Governments and companies are also using countries' courts and legal systems as instruments of oppression against those who threaten their power and interests.

A review of the Global Witness data from 2002-2017 confirms that many deaths are related to conflicts over natural resources, including fossil fuels, timber, and water.²² Mining was the deadliest sector, with 43 defenders killed while protesting against the destructive effects of mineral extraction on people's land, livelihoods, and the environment.²³ Violence against defenders may be carried out by those representing their industry's interests, such as illegal loggers²⁴ or miners,²⁵ or on behalf of government interests.²⁶

¹⁹ UNGA 1948; see, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS

²⁰ UNEP, "Who are environmental defenders?" <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/who>

²¹ IUCN (2021), "Environmental Defenders and their recognition under International and Regional Law - an Introduction." Available at: https://www.iucn.nl/app/uploads/2021/03/environmental_defenders_and_their_recognition_under_international_and_regional_law.pdf

²² Nature Sustainability (2019), "The supply chain of violence." Available at: <https://www.nature.com/articles/s41893-019-0349-4>

²³ Transparency International, "Corruption perception Index". Available at: <https://www.transparency.org/cpi2018>

²⁴ <https://www.globalwitness.org/en/campaigns/environmental-activists/perus-deadly-environment/>

²⁵ <https://www.theguardian.com/world/2019/jul/28/amazon-gold-miners-invade-indigenous-village-brazil-leader-killed>

²⁶ <https://www.theguardian.com/environment/2018/jan/31/cambodian-forest-defenders-killed-after-confronting-illegal-loggers>

Threats against Environmental Human Rights Defenders in Kenya

Kenya's EHRDs face worsening attacks and threats, with the African Commission's Special Rapporteur on Human Rights Defenders documenting several cases of violations, including attempted murder, arbitrary arrests, threats, and judicial intimidation.²⁷ In 2017, the Center for Justice Governance and Environmental Action (CJGEA) underscored this, observing that these are "very trying times" for activists working in the area of the environment and human rights.²⁸ Journalists documenting violations face similar threats as HRDs, with Freedom House reporting 28 journalists threatened or attacked in 2013.²⁹

In December 2018 in a joint report, Human Rights Watch and the National Coalition of Human Rights Defenders noted that Kenyan police and the military were harassing and intimidating environmental rights activists in Lamu county.³⁰ At least 35 activists campaigning against the Lamu Port-South Sudan-Ethiopia Transport Corridor Project (LAPSSET) had faced threats, beatings, arbitrary arrests, and detention by police, military or other government officials. Two activists were arrested during a peaceful protest in Lamu. They were protesting against the government's decision to proceed with construction of a power plant despite the obvious environmental and health concerns. In 2016, two activists disappeared, one of them presumed dead, after being arrested; and in at least 15 instances, police accused activists of having links or being sympathetic to the Al-Shabab terrorist group.³¹

Government authorities have responded by denying knowledge of these abuses and casting suspicion on the motivations of the organizations and activists involved. The hostility and dismissive attitude of the government has discouraged activists from reporting abuses and pursuing justice.³²



Recent extra-judicial killings of environmental defenders put Kenya on a list of countries considered hostile to land and environmental defenders. These killings include: -

1. Robert Kiroich (2018):

The 41-year-old member of the Sengwer Indigenous Community was shot and killed, while other members of the community were injured, by EU-funded guards working for the Kenya Forestry Service (KFS) in the Embobut Forest area of the Cherangany Hills in Western Kenya.³³

2. Jomo Nyanguti (2018):

A river defender shot and killed by the police officers for protesting the construction of the controversial Bonyunyu Dam that was to displace thousands of community members from their ancestral land. He had confronted police officers who were guarding surveyors mapping the dam site. Police also arrested three people during the confrontation.³⁴

3. Esther Mwikali (2019):

This 57-year-old land rights activist's mutilated body was found dumped near her home at Mithini village in Murang'a County in August 2019. The defender was among 212 eco-defenders globally who were murdered in 2019.³⁵

4. Desmond Bradley Marten (2019):

A conservationist who specialized in matters to do with ivory trafficking research and undercover work investigating the black market. He was found with a stab wound to his neck.³⁶

5. Joanna Stutchbury (2021):

An environmental activist shot dead following death threats while campaigning against developers encroaching on the Kiambu Forest. She had spoken out against land-grabbers and well-known private developers who had encroached on the Kiambu Forest next to where she lived. She hit the headlines in 2018 when she single-handedly confronted developers who were felling trees in Kiambu Forest.³⁷



²⁷ The Situation of Human Rights Defenders in Kenya: <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=1301&file=EnglishTranslation>

²⁸ Civicus (2017), "Land rights and environmental activism: a case study from Kenya". Available at <http://www.civicus.org/documents/reports-and-publications/SOCS/2017/essays/land-rights-and-environmental-activism-a-case-study-from-kenya.pdf>

²⁹ Ibid

³⁰ Human Rights Watch (2018), "They Just Want to Silence Us" Abuses Against Environmental Activists at Kenya's Coast Region". Available at <https://www.hrw.org/report/2018/12/17/they-just-want-silence-us/abuses-against-environmental-activists-kenyas-coast>

³¹ Ibid

³² Ibid

³³ Forest Peoples Project (2018) "Indigenous Sengwer man shot and killed by EU-funded guards". Available at <https://www.forestpeoples.org/en/rights-based-conservation/press-release/2018/indigenous-sengwer-man-shot-and-killed-eu-funded>

³⁴ International Rivers (2018), "River Defender Shot Dead in Kenya". Available at <https://archive.internationalrivers.org/pt-br/node/16610>

³⁵ Daily Nation (2020) "Kenya Among Countries Hostile to Environmentalists - Report". Available at <https://allafrica.com/stories/202008030982.html>

³⁶ BBC (2018), "Esmond Bradley Martin: Ivory investigator killed in Kenya". Available at <https://www.bbc.com/news/world-africa-42943503>

³⁷ Daily Maverick (2021), "Kenyan forest defender Joanna Stutchbury assassinated in gangster-style slaying". Available at <https://www.dailymaverick.co.za/article/2021-07-20-kenyan-forest-defender-joanna-stutchbury-assassinated-in-gangster-style-slaying/>

Enablers of Threats Against Defenders in Kenya

Corruption and impunity

The failure of many governments and companies to act responsibly, ethically, or even legally, is a major driving force behind crimes committed against environmental and land rights defenders. Many of the countries where high incidents of killings and harassment are reported are classified as highly corrupt, according to the Corruption Perceptions Index score.³⁸

Widespread impunity makes it difficult to identify perpetrators and hold them accountable for human rights abuses or crimes against Defenders. Global Witness was able to link state security forces to 40 of the total number of killings reported in 2018 globally and private actors were suspected aggressors in 40 deaths. This presents a difficult scenario for accountability; especially where the state is responsible for the violations but is also expected to protect the defenders at the same time.³⁹

Lack of a law specific to the protection of Human Rights Defenders (including EHRDs)

Many governments have not adequately developed systems for ensuring that those who speak to defend environmental-related rights are themselves protected.⁴⁰ The most common approaches to protecting environmental defenders in many countries include whistleblower laws and laws preventing retaliation (including developing the common law to prevent the use of Strategic Litigation Against Potential Plaintiffs or “SLAPP Suits” against activists).

At the national level, Kenya does not have a law exclusive to the protection of EHRDs. Whereas EHRDs contribute to the realization of the right to a clean and healthy environment and advance the protection of other rights in the Bill of Rights, there is no specific mention of this role in Kenyan laws. Article 69 of the Constitution, which outlines the responsibility of the State towards achieving the right to a clean and healthy environment, falls short of placing an express obligation on the State to protect EHRDs. Recognition and protection of EHRDs can only be inferred through interpretation of other laws including:

- The Constitution of Kenya
- Public Order Act (Cap 56)
- Prevention of Torture Act, No. 12 of 2017
- Access to information Act, No. 31 of 2016
- Legal Aid Act, No. 6 of 2016
- The Witness Protection Act No. 16 of 2006

Failure by the state to abide by its obligations under international law

International conventions and treaties ratified by Kenya form part of the laws of Kenya pursuant to Articles 2 (5) and (6) of the Constitution. Conventions which speak to recognition and protection of HRDs include: the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); The International Covenant on Economic, Social and Cultural Rights (ICESCR); the African Convention on the Conservation of Nature and Natural Resources; the Convention against torture and other cruel, inhuman, or degrading treatment or punishment; and the African Charter on Human and Peoples’ Rights.

The UN and African Union (AU) have also recognised the significant contributions of EHRDs through its resolutions such as the:

- **Human Rights Council Resolution 40, “Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development”;**
- **Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms;**
- **UNGA Resolution 68/181: Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: Protecting Women Human Rights Defenders (A/RES/68/181), 2013;**
- **African Commission on Human and Peoples’ Rights, Resolution 69: Resolution on the Protection of Human Rights Defenders in Africa, 2004;**
- **African Commission on Human and Peoples’ Rights Resolution 336: Resolution on Measures to Protect and Promote the Work of Women Human Rights Defenders, 2016.**

However, Kenya has failed to implement the UN Declaration on HRDs despite recommendations by States to do so. This has further weakened legal protection for HRDs. According to the International Service for Human Rights (ISHR)⁴¹, as of 2010, Kenya had accepted all twelve recommendations made in relation to the right to freedom of expression and the protection of HRDs, including a recommendation to review national legislation to ensure freedom of expression, and a recommendation to investigate attacks against HRDs. None of these recommendations have been implemented to date.

³⁸ Corruption Perception Index, 2021. Available here: https://images.transparencycdn.org/images/CPI2021_Report_EN-web.pdf or <https://www.transparency.org/en/cpi/2022>

³⁹ Global Witness (2020), “Enemies of the State”.

⁴⁰ The Conversation (2019), “More than 1,700 activists have been killed this century defending the environment.”

⁴¹ ISHR Policy Brief (2021) “The Situation of Human Rights Defenders in Kenya”. Available at https://ishr.ch/wp-content/uploads/2021/08/kenya_-_upr_briefing_paper.pdf

Backward laws that limit civic spaces

The Computer Misuse and Cybercrimes Act 2018 is one of the laws violating the privacy of HRDs. The Act allows for criminal sanctions and gives leeway to the government to inspect documents held by HRDs. The Act was held to be constitutional in the ***Bloggers Association of Kenya (BAKE) v Attorney General & 3 others***; Article 19 East Africa & another (Interested Parties) [2020] eKLR (the BAKE case) despite its stringent measures.⁴²

The Kenya Information and Communication Act (KICA) has also been criticized as a draconian law which undermines freedom of expression. The Law provides for the establishment of a Communications and Multimedia Appeals Tribunal which is mandated to hear complaints from an aggrieved party on any publication by or conduct of a journalist or media enterprise, anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise or, any action taken, any omission made, or any decision made by any person under the Act. The Tribunal has powers to impose a hefty fine of not more than twenty million shillings on any respondent media enterprise and a fine of not more than five hundred thousand shillings on any journalist adjudged to have violated the Act. *These fines have been viewed as unconstitutional as they limit freedom of expression.*⁴³

There have also been attempts to introduce laws in Kenya's legal system or interpret and enforce existing laws in a manner that undermines the role of HRDs. A case in point is the Public Order Amendment Bill, 2019, which sought to limit the freedom of assembly and picketing by creating an offence and holding organizers of public meetings or processions which result in loss of property, life or earnings, vicariously liable for the loss (even where they had no knowledge

of the damaged property or loss of life and were not connected to the perpetrators). Such organisers would be responsible for compensating the affected persons. The Bill was, however, rejected by Parliament for violating constitutional provisions.



Difficulty in holding non-state actors liable for violation of HRD's rights

The Bill of Rights in the Kenyan Constitution binds both the State and non-state actors. However, HRDs whose rights are violated by **non-state actors**, have failed to get compensation/remedies from the non-state actors despite succeeding in court cases. An analysis of international declarations on HRDs also proves that a large number of the obligations are placed on State actors as opposed to non-state actors. And even where provisions related to obligations of non-state actors are included, they are specific to human rights and do not carry a criminal sanction. *There is a need to craft specific criminal sanctions against non-state actors for harmful acts committed against HRDs, in addition to the existing Penal Code.*



⁴² Petition 206 of 2019 <http://kenyalaw.org/caselaw/cases/view/191276/>

⁴³ The Nation (2013, updated 2020) "Controversial media Bill signed into law". Available at <https://nation.africa/kenya/news/politics/controversial-media-bill-signed-into-law-927630?view=htmlamp>

POLICY RECOMMENDATIONS

Improve respect and political goodwill towards defenders

Many of the individuals behind incidences of attacks and violations have political ties and financial muscle. This is because, while engaging in activism, EHRDs often find themselves speaking truth to powerful people determined to protect their personal businesses and financial interests at all costs. For such individuals, issues of environmental protection are never at the top of their agenda. This has resulted in weak enforcement of the law and lack of respect for the rule of law when implementing development projects. The general lack of political goodwill also stands in the way of holding perpetrators of violations accountable for their actions.



There is a need to create awareness about the significant role of EHRDs among the political class, as well as the obligations of business and private entities to respect their rights and freedoms.

Strengthening compliance and accountability in the implementation of development projects

Because of the prevailing lack of accountability for threats against EHRDs, failures in environmental governance and lack of emphasis on sustainability of our environment, there is an increase in environmental threats and violations. Although all people have a stake in protecting the environment and in ensuring respect for environmental rights, environmental defenders, who are often ordinary citizens, are usually on the frontline of exercising their rights to promote and protect the environment, often at the expense of their lives. The criminalization and increasing attacks on environment defenders are clear violations of the environmental rule of law and an affront to the rights, roles and contributions of indigenous peoples and civil society in protecting our environment.

The rule of law in environmental matters is essential for equity and the promotion and protection of environmental and other socio-economic rights. With strong environmental laws and institutions, countries are not only able to tackle environmental issues and violations by enforcing environmental laws, but they also significantly reduce the risks that environmental defenders are exposed to because of environmental non-compliance.

There is, therefore, a need to strengthen the enforcement of the rule of law by strengthening institutional capacity to achieve the right to a clean and healthy environment and subsequently reduce the risks posed to environmental defenders. This includes making stronger provisions requiring the effective and meaningful consultation of EHRDs throughout the cycle of development project implementation. Where there is lack of meaningful participation, EHRDs should have access to adequate and effective remedies.

Enactment of a national law specific to the protection of EHRDs in Kenya

Whereas whistleblower and witness protection laws are critical to protecting environmental defenders (since they provide protection from retribution and provide rewards to government employees and/ or other persons who report violations of the law), *there is still a need to have a law that specifically affirms the significant role of HRDs (including EHRDs) and addresses the unique risks and challenges they face when exercising their rights, which can include their freedom of expression, peaceful assembly and association.*

Ratification, domestication, and implementation of Kenya's obligations on the protection of EHRDs under international law

As highlighted above, there is a wide body of international conventions, as well as laws at the regional and international level which places an obligation on states to ensure the protection of EHRDs and create an enabling environment that allows them to engage in activism in a safe and effective way. This includes collecting, documenting and reporting killings and threats to HRDs, as well as holding perpetrators accountable for their actions.

The Kenyan government needs to ratify, domesticate, and implement these laws to strengthen the legal and institutional framework on the protection of EHRDs.

Reviewing, amendment and/or repealing of laws that limit civic spaces

The Kenyan Parliament, in consultation with EHRDs, should work together towards *reviewing, amending and, where necessary, repealing laws which limit the freedom of peaceful assembly and association beyond the confines of the Constitution.*

THE IMPACT OF A NEW LEGAL FRAMEWORK

1. Strengthened legal and institutional framework on the protection of EHRDs which will guarantee a more proactive approach to the protection of defenders.
2. It will enhance and strengthen accountability among state and private actors.
3. Enhance spaces for effective participation of the public in decision-making processes and dialogues between the state/business entities and the general public.



